FILED
AUG 5 1974
MICHAEL RODAK, JR., CLERK

No. 74-68

In the Supreme Court of the United States

OCTOBER TERM, 1974

CLARION CORPORATION,

Petitioners,

vs.

AMERICAN HOME PRODUCTS CORPORATION, LEHMAN BROTHERS, and RICHARD F. WATT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered April 2, 1974 in Cases No. 73-1418 and 73-1419 which order was denied rehearing on May 17, 1974.

OPINIONS BELOW

The Court of Appeals for the Seventh Circuit entered its original order and opinion on April 2, 1974. This order and opinion appears as Appendix A. The order was amended when a petition for rehearing was denied on May 17, 1974. This order appears as Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit was made and entered April 2, 1974. A Petition for Rehearing was denied by the Court of Appeals for the Seventh Circuit on May 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in not addressing the issue that the District Court Judge was not qualified to have presided over the case because of demonstrable bias and overwhelming conflict of interest involving a key party defendant.

2. Whether the Court of Appeals erred in not addressing the question that the District Court Judge was biased and had a personal interest in denying an evidentiary hearing.

3. Whether the Court of Appeals erred in not addressing compelling evidence raising the question that all of the District Court Judge's rulings and orders in the case are tainted self-serving acts calculated to cover-up his culpability in the cover-up of crucial evidence.

4. Whether the Court of Appeals erred in not providing relief requested by petitioner with respect to its inability to secure competent counsel because of the widespread code of silence existing among lawyers.

5. Whether the Court of Appeals erred in allowing Rule 70 F.R.C.P. to be used as an unconstitutional means to seize unrealized proceeds of an uncompleted settlement contrary to long standing law holding that the Illinois Attorney's Lien Statute must be strictly construed; that petitioner has complete control over its actions in completing a settlement and that the enforcement of an attorney's lien is barred until such time as proceeds are actually forthcoming under a completed settlement.

6. Whether the Court of Appeals erred in not addressing petitioner's allegations bearing on the Illinois Attorney's Lien Statute violating due process requirements of the constitution by barring the debtor's rights to trial by jury and to assert cross and counter-claims.

7. Whether the Court of Appeals erred in concluding petitioner is attempting to relitigate previously adjudicated questions.

8. Whether the Court of Appeals erred in imposing severe Rule 38 sanctions against petitioner, a finding which would have been rebutted if the District Court Judge had not unjustly denied an evidentiary hearing which would have brought into the District Court record evidence brought to the attention of the Court of Appeals but which it did not address because it was not in the record.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No Person shall * * * be deprived of life, liberty or property without due process of law."

AMENDMENT XIV

"No state shall * * * deprive any person of life, liberty or property without due process of law."

STATUTE INVOLVED

Chapter 12 §14 of the Illinois Revised Statutes, Attorney's Lien Statute, is printed in Appendix C, *infra.*

STATEMENT OF THE CASE

The Court of Appeals decision consolidated two appeals:—in Appeal Case No. 73-1418 petitioner sought to re-open the suit against American Home and Lehman, 67 C 437 on grounds that its former counsels, the District Court judge, Judge William J. Lynch and Lehman Brothers colluded to fix the case by covering up crucial evidence and to conceal the cover-up then manipulated and coerced petitioner into accepting a settlement offer which is still unexecuted. Appeal Case No. 73-1419 involves the action by Richard F. Watt, one of petitioner's former counsel implicated in the cover-up conspiracy, who is seeking to enforce a $20,428 attorney's lien against the still uncompleted settlement.

Due to the widespread code of silence in the legal profession which in this case is exacerbated by Judge Lynch's gross improprieties, petitioner, under protest, has been acting through its president who is not an attorney. The lower courts have treated this as a pro se case. On the code of silence question raised by petitioner the appellate court concluded that lawyers have refused to represent petitioner because they recognize its position is frivolous. According to a letter dated June 3, 1974 received from, Mr. Watt's attorney, Altheimer & Gray, the appellate

court reached its conclusions on the narrow grounds of deciding the case on the record originally made in the District Court.

The District Court record does not contain the documented proof presented to the Court of Appeals showing that the case was fixed by the means of keeping out of the record the covered-up evidence and that the coerced acceptance of the still uncompleted settlement constitutes an involuntary agreement. In arriving at its decision the appellate court did not address the issue which petitioner expressly raised in the District Court, namely, that Judge Lynch disqualify himself on grounds of direct and overwhelming conflicts of interest with a key party defendant, Edwin L. Weisl, and that an evidentiary hearing be conducted by another judge. This is a pivotable issue bearing on the fairness of the appellate decision because the evidentiary hearing which Judge Lynch summarily denied would have formally introduced into the District Court record the cover-up evidence presented to the Court of Appeals. The importance of the evidentiary hearing as to how it will affect an appellate review is indicated by the fact that the cover-up evidence kept out of the record but otherwise presented to the Court of Appeals clearly rebuts the appellate decision including the imposition of severe Rule 38 sanctions against petitioner. The Appellate decision also did not address the overriding issue expressly raised by petitioner and corroborated by the omitted evidence that all of Judge Lynch's orders and rulings on the case are tainted because the demonstrable pattern of his personal involvements prove he is a principal in the cover-up and, in effect, was sitting in judgement on himself.

Appeal Case No. 73-1418

This appeal which seeks to re-open the suit against American Home and Lehman involves the 1965 merger of Ekco Products Company, a large New York Stock Exchange listed firm, into American Home in which petitioner is acknowledged by all parties to be the sole finder. The Court of Appeals based the thrust of its decision on an August 5, 1962 letter by petitioner to Ekco which ' as no application to the 1965 merger involved in the suit. The August 1962 letter which purportedly agreed to a $100,000 finder's fee was given at American Home's insistence to Ekco as a result of a threat that the parties to the merger would otherwise manipulate the proceedings in a manner as to cause forfeiture of any finder's fee. When American Home terminated the proceedings without explanation in late 1962, Ekco's reaction was to withdraw itself from merger possibilities with anyone else. This was confirmed in an Ekco letter to petitioner dated January 16, 1963 stating that Ekco "is not for sale, by merger or cash, to anyone." Since petitioner's August 1962 letter on its face was limited to the 1962 proceedings the total termination of the 1962 proceedings also terminated and cancelled petitioner's letter which is used by the Court of Appeals as the key element of its decision. Other evidence not addressed by the appellate court bears on the fact that the letter was superceded by a new agreement in 1965 when petitioner brought the parties together again in an entirely new merger proceedings which involved a much larger price consideration based primarily on the parties accepting petitioner's proposal on how to to formulate new negotiations. On February 3, 1965 American Home, on its own initiative offered to have the

new transaction provide for a finder's fee larger than the $100,000 provided in the aborted 1962 proceedings because, as it stated, Ekco "complained $100,000 was not enough." American Home, thereafter, by letter dated February 16, 1965 instructed petitioner to arrange for its new fee with Ekco and pursuant to these instructions a 1/2 of 1% finder's fee agreement was orally reached with Ekco on March 20, 1965. This confirmed by petitioner to Ecko by letter of March 22, 1965 and later was also confirmed to American Home. After using petitioner's services in bringing the parties together and using its ideas on how to formulate the new negotiations, American Home and Ekco refused to honor the new 1/2 of 1% agreement, but in doing so paid the same 1/2 of 1% to Lehman for its services in setting the specific terms of the stock exchange formula as originally proposed by petitioner. The evidence not addressed by the appellate court included direct proof that Lehman used fraudulent means to interfere with petitioner's contract and business relationships to appropriate and take under false pretenses the $916,000 finder's fee properly belonging to petitioner and that this proof of damages was covered-up by petitioner's former counsels acting in a combination of maneuvers with Judge Lynch and Lehman.

Opposing parties do not dispute petitioner's allegations presented to the Court of Appeals that hidden interlocking business relationships existed between Lehman, Judge Lynch and Albert E. Jenner, Jr., of Jenner & Block, who was petitioner's first counsel in the suit. The magnitude of Lehman's and American Home's jeopardy which motivated and prompted the trial judge and large law firms to engage in a covert cover-up conspiracy is further indicated by the fact that the covered-up evidence collat-

erally will expose Lehman to criminal liability for using the mails to perpetrate what amounts to a $916,000 theft or larceny by deception and also colluding with American Home in an income tax evasion scheme involving $400,000 taxes.

Lehman was a competitor of petitioner in also trying to arrange a merger for Ekco, but when it failed and petitioner succeeded, Lehman used its inside position of being on Ekco's board of directors and being the negotiator-consultant for Ekco, to undercut petitioner's relationships with American Home and Ekco by falsely representing to them that the customary practice is to pay a finder in a merger transaction 10%-15% of the fee the negotiator receives after which Lehman physically appropriated the $916,000 finder's fee by justifying its negotiating fee on the basis of misrepresenting finder's fees paid in other merger transactions to be negotiating fees.

Judge Philip W. Tone of the 7th Circuit Court of Appeals, then a partner of Mr. Jenner, handled Lehman's deposition taken January 12, 1968 in which Lehman on pages 143-147 testified under oath, that it knew of hundreds of merger transactions in which finders were paid 10%-15% of the fee paid to the negotiator and offered to supply representative examples of such merger transactions. Two months later, just before returning to New York to complete the Lehman deposition, Judge Tone called petitioner on the phone to state he fully intended to pursue these examples. On his return, however, he stated he dropped the idea because "it would be a Congressional investigation." At a meeting with Judge Tone, Mr. Jenner and their associate, Donald R. Harris, Mr. Jenner agreed to prepare an interrogatory which became inter-

rogatory 4. On May 2, 1969 (one year and four months after Lehman first offered to supply representative merger examples) Lehman filed its answer, Document 94, in which it represented that the underwriting examples listed in its answer are the same as merger transactions insofar as showing that fees paid to finders bringing underwriting situations to investment bankers also applies to petitioner's position as the finder in the Ekco merger. No explanation was given why Lehman could not furnish examples from the hundreds of merger transactions it testified under oath it knew of where the finder was paid 10%-15% of the fee the negotiator received. Whatever a finder may or may not receive in bringing an underwriting situation to an investment banker is patently a fraudulent comparison if for no other reason than the basic role of the underwriter does not entail negotiating a merger transaction, but principally involves the finding services of locating buyers of securities. Mr. Jenner and Judge Tone, whose corporate practice includes clients who are major factors in the underwriting field and large corporations who are active in the merger-acquisition field, accepted without challenge Lehman's fraudulent representations that finder's fees paid in underwriting situations justified Lehman's representations to American Home and Ekco that petitioner is entitled to only 10%-15% of what a negotiator receives in a merger transaction.

At the same meeting in which petitioner prevailed on Mr. Jenner to prepare Interrogatory 4 to pursue what Judge Tone refused to do by the more effective cross examination route of a deposition, petitioner raised the second part of how Lehman appropriated the $916,000 finder's fee belonging to petitioner. Lehman did this by sending two letters to Ekco justifying its claim for $916,000

on the basis of a number of similar merger transactions listed in the letters and misrepresenting finder's fees paid in those mergers as negotiating fees. The letters further justified the $916,000 on the basis that on the dates of the letters the $916,000 was 1/2 of 1% of the market values of the stock involved in the merger. Mr. Jenner and Judge Tone then engaged in a highly technical discussion of procedural law on the basis of which they advised it would be disadvantageous to pursue the question of whether the negotiating fees were really finder's fees. A day or two later petitioner asked Mr. Harris to explain what they talked about and Mr. Harris who is now a partner in the Jenner firm and teaches civil procedure admitted he too did not understand their colloquy. After more skirmishing with Mr. Jenner and Judge Tone an interrogatory was finally prepared which became Interrogatory 14.

Kirkland & Ellis objected to Interrogatory 14 on grounds petitioner should be required to get this information not from Lehman but from the recipients of the fees. Mr. Jenner and Judge Tone made no rebuttal to what is an misleading objection since the two Lehman letters identified two specific fees which named Lehman as being the recipient. On March 20, 1969 Judge Lynch denied these discoveries after which petitioner was informed nothing further could be done once the ruling was made. As is now known Mr. Jenner and Judge Tone should have on their own initiative reargued the denial on the obvious grounds that under the very language of the Kirkland & Ellis objection discoveries were clearly ailowable on at least the two fees identified by Lehman as being received

by Lehman. In this time frame, petitioner learned that Mr. Jenner and Judge Tone kept petitioner in the dark about direct business relationships they then had with Edwin L. Weisl, who was general counsel to both Lehman and American Home and, as a Lehman partner, is a party defendant. With the disquieting indications that Mr. Jenner and Judge Tone were evading and defeating important discoveries, they were released from the case. For these questionable services they collected $26,553 from petitioner which seriously depleted petitioner's financial resources for pursuing the case. Petitioner learned that after leaving the case, Mr. Jenner and Judge Tone became Chicago counsel for Lehman and other of Mr. Weisl's clients.

Concerning Judge Lynch's interlocking business relationships with Mr. Weisl and Mr. Jenner and Judge Tone, at the time Judge Lynch denied Interrogatory 14 he was in process of selling his stock in Chicago Thoroughbred Enterprises (CTE) for over $1½ million in a transaction that borders on Mr. Weisl being the buyer. As a result of leads coming out of the Judge Kerner trial, the official records of the Illinois Racing Commission and records of the U. S. District Court in Chicago in *Marjorie Everett* v. *Gulf & Western Industries*, 70 C 1787, the following evidence was developed and presented to the Court of Appeals:—

On March 20, 1969, the date on which Judge Lynch denied the important Interrogatory 14, Judge Lynch was in process of selling his holdings as second largest shareholder in CTE for over $1½ million to Gulf & Western Industries in a transaction arranged and negotiated by Mr. Weisl. Mr. Weisl also was a substantial shareholder in CTE through shares held by his wife Alice Weisl, and as

general counsel and director of Gulf & Western, Mr. Weisl was on both sides of the transaction. Charles G. Bludohrn, head of Gulf & Western testified before the Illinois Racing Commission that Mr. Weisl was the moving figure in Gulf & Western buying CTE. Judge Lynch had business links with Mr. Weisl going back many years in connection with their joint associations in policy making positions in CTE. In a scheme designed to get favorable dates for its horse racing operations, CTE sold its stock at bargain prices to influential public officials including Judge Otto Kerner then governor of Illinois who theretofore had an unblemished record for public service as governor, as a jurist and in the military. Judge Lynch's direct involvements in these suborning activities were confirmed by documents filed by the U. S. Attorney in the case. Judge George J. Schaller of the Cook County Circuit Court succeeded Judge Lynch as general counsel to CTE and his testimony given on January 15, 1973 in the Judge Kerner trial verified numerous transactions in which Judge Lynch acted as nominee for many of the public officials which had the purpose of concealing from the public records of the Illinois Racing Commission that influential politicians held CTE stock.

On January 15th and 16th, Modie J. Spiegel and his attorney, Albert E. Bell, testified in the trial that Judge Lynch carried out CTE's demands that Mr. Spiegel dissolve a voting trust in Chicago Harness Racing, Inc. (CHR) which leased CTE facilities for its harness racing operations. Messrs. Spiegel and Bell testified that Judge Lynch, to justify his making an angry threat of serious consequences if CTE's demands were not met, made completely untrue charges (characterized by Mr. Bell as "laughable") of

Mr. Spiegel "having tricked everybody." Messrs, Spiegel and Bell testified they interpreted Judge Lynch's angry words to be a veiled threat he would use his considerable political influence to cause Spiegel, Inc. harm. Mr. Spiegel, who was Chairman and Chief Executive Officer of Spiegel, Inc., a large mail order firm, capitulated to the threat by dissolving the voting trust and also selling his holdings in CTE and CHR to individuals designated by CTE.

Judge Lynch's use of fear also extends into the conduct of his judicial office as evidenced by a threat to blacklist Arnold I. Shure, a well known lawyer, because of a vigorous presentation Mr. Shure made in a proceedings before Judge Lynch. When petitioner talked with Mr. Shure about this incident which is widely circulated by the grapevine among lawyers, he did not hesitate to verify the episode quoting the exact scatalogical language used by Judge Lynch. Along these lines, the Chicago Council of Lawyers which is affiliated with the American Bar Association, in an extensive survey reported that the preponderance of lawyers responding to the survey reported opinions, based on experiences before Judge Lynch, that he is biased and subject to influence.

Among Mr. Watt's first acts when taking over the case in July 1969 was to make inquiry of Judge Lynch of his relationships with Mr. Weisl (something which Mr. Jenner refused to do). Judge Lynch described Mr. Weisl only as a "fond friend" on the basis of which Mr. Watt refused to do anything further because, as he stated to petitioner, he could not afford to offend him and thereby jeopardize other cases he had in his court. In July 1969, Mr. Watt went to New York to secure documents from Lybrand Ross Bros. & Montgomery, accountants for Amer-

ican Home and Ekco, which resulted in two particularly important documents 14 and 15 depicting Ekco bookkeeping entries showing the $916,000 payment to Lehman as a "finder's fee." In November 1969 Mr. Watt went back again to New York and in a deposition taken of Edgar Karp, a Lehman official, Mr. Karp unwittingly testified from personal knowledge that one of the fees listed as a negotiating fee in the two Lehman letters to Ekco was for finding services he personally rendered as a Lehman employee. About ten days later, petitioner found at Northwestern University School of Business Library a number of proxy statements showing other fees to have been finder's fees including several paid as finder's fees to Lehman. Xerox excerpts of the proxy statements were given to Mr. Watt to reinforce the position he stated on page 54 of the Karp deposition of rearguing Judge Lynch's denial of Interrogatory 14.

Mr. Watt's statement on page 54 of the Karp deposition to the effect of planning to reargue the denial of Interrogatory 14 was in keeping with a prior analysis he made of the case in which he told petitioner that Mr. Jenner and Judge Tone "sold out" to Lehman. After the Karp revelation and the proxy material found at Northwestern University was given to him, Mr. Watt then was faced with the realization that going ahead in rearguing Interrogatory 14 would place him in jeopardy with Judge Lynch because gathering that evidence would build a clear case that Mr. Weisl shared as a Lehman partner in the illicit $916,000 Lehman took under false pretenses. Judge Lynch's description of Mr. Weisl as only a "fond friend" has special significance as a misleading half-truth calculated to inspire the same kind of reactions Modie J. Spiegel and his attorney, Albert E. Bell, testified, under oath, in

the Judge Kerner trial (pages 2434-2446 and 2738-2764 of the trial transcripts) that they were afraid of the kind of reprisals Judge Lynch was in a position to make if they crossed his personal interests. Mr. Watt does not challenge the correctness of petitioner's allegations that he refused to seek Judge Lynch's removal as the trial judge on the basis of the "fond friend" disclosure because such a move would offend him and it would jeopardize the interests of other clients who have cases before Judge Lynch. It is significant that if Judge Lynch had not falsified the Weisl relationship by wilfully withholding the business ties going back to their joint associations in the scandal ridden CTE, Mr. Watt could not have brushed aside that kind of compelling information in seeking Judge Lynch's disqualification.

Petitioner, through a senior partner of a large prestigous law firm, knew of Mr. Weisl being a powerful person on the national political scene with strong influence in the Mayor Daley political organization of which Judge Lynch was a co-founder. This information was passed on to Mr. Watt who has definite pragmatic views on the character of the impact this political organization has on courts in Chicago. That Mr. Watt, as a well informed sophisticated lawyer, recognized from the information he knew about the backgrounds of Judge Lynch and Mr. Weisl that there was more to the relationship than Judge Lynch disclosed is evident from the revelations that surfaced from the Judge Kerner trial that Judge Lynch and Mr. Weisl had joint long time business associations in CTE which extended into the period Judge Lynch presided over this case. The sale by Judge Lynch, during the period he was presiding over the case, of his CTE stock which was enhanced by the suborning activities is significant in de-

termining why he engaged in the serious act of falsifying the Weisl relationship. Mr. Weisl was the moving force for Gulf & Western Industries buying CTE and by being able to thereby realize the fruits of CTE's suborning activities, Judge Lynch was the beneficiary of Mr. Weisl's actions. He therefore had a personal interest on behalf of Mr. Weisl in the case and from the standpoint of the jeopardy of Mr. Weisl and his clients and partners in the predatory acts committed against petitioner plus the collateral income tax evasion aspects of the covered-up evidence, it was imperative that Judge Lynch conceal the truth about his relationships with Mr. Weisl so that he would remain in the case to cast his influence in seeing that Mr. Watt did not develop the truth on how Lehman took the $916,000 under false pretenses. It is a matter of documentary proof that Mr. Watt's last honest effort in the case was the Karp deposition after which he did a complete about face and in collusion with Judge Lynch, he thereafter systematically covered up the evidence relating to Lehman's predatory acts. To conceal what they did, Mr. Watt and Judge Lynch also constructed an end in which petitioner was misled and coerced into accepting a settlement offer that is the equivalent of what American Home originally offered in 1965 during the merger proceedings. When petitioner tried making a complaint it was subjected to abusive intimidating tactics which included two unwarranted threats of jail contempt in order to try and bring petitioner under complete subordination so that it would drop its complaint.

Mr. Watt has already collected $13,637 from petitioner and the additional $20,428 he is seeking under his pending lien action which is a subject of this petition is under the false pretenses he faithfully pursued his client's interests. He began his part in the cover-up conspiracy by taking the innocuous steps in December 1969 to amend the com-

plaint to include Count IV conspiracy ostensibly, as told to petitioner, to qualify the Lybrand documents 14 and 15 depicting Ekco's books as showing the $916,000 payment to Lehman to be a "finder's fee." On the eve of the trial, April 7, 1970, Mr. Watt in a surprise disclosure twisted conspiracy to suppress the very documents it was supposed to qualify as admissable evidence. As pursuing conspiracy built up with lengthy pleadings, interrogatories and hearings, Mr. Watt claimed it was taking up all his available time so that he could not reargue the denial of Interrogatory 14 and he lulled petitioner into believing that certified SEC copies of the proxy statements on the transactions listed in the two Lehman letters would do just as well. On the protext he would take care of this on one of his frequent trips to Washington, D. C. he kept delaying until the time when he finally did send a letter, the SEC advised there was not the time they require to get documents from its warehouse archives before the April 8th trial date.

On February 18, 1970, Mr. Watt filed a motion seeking Lehman documents which would rebut Lehman's spurious defense that 90% of the $916,000 was for non-merger routine financial services, but after the February 25th hearing, the motion disappeared without any action one way or the other by Mr. Watt or Judge Lynch. These Lehman documents are important not only to the suit but also to IRS in connection with the government's interest to recover $400,000 income taxes resulting from Ekco claiming most of the $916,000 as an ordinary business expense. To support the spurious 90% defense in the suit, a Lehman letter dated March 30, 1967 (AHP 61) was part of the original batch of documents voluntarily submitted by American Home and Lehman. This letter (which was written 9 days after the suit was instituted) was sent to American

Home's tax attorney for transmittal to the IRS agent then auditing the Ekco return. The letter stated that no time records were kept but that around 90% is an accurate estimate for the routine financial services unrelated to the merger. The alleged unrelated merger services were described in vague generalized terms. During his audit the IRS agent contacted petitioner seeking information that the entire $916,000 paid to Lehman was a non-deductible finder's fee. Pursuant to this inquiry petitioner called the attention of IRS to the accounting material subsequently gathered in the suit indicating Ekco and American Home concealed from the agent books and records showing that during the merger proceedings they planned to pay Lehman the $916,000 as a "finder's fee" and they recorded the payment as a "finder's fee" on their books of original entry. The set of books created by double reversing entries misrepresenting most of the $916,000 as an ordinary business expense were the books shown to the agent. The IRS special agents who reviewed the accounting material reluctantly concluded that in face of Lehman cooperating with American Home they could not be successful in recovering the $400,000 income taxes involved in the deduction the agent allowed unless they had the records on the specific work Lehman performed. The documents needed by the government are also the documents encompassed by the February 18, 1970 motion which disappeared without a trace from the case.

The disappearance of the February 18th motion was followed by the disappearance of the important deposition by David Canmann, an Ekco official who worked closely with Lehman on the merger. Mr. Canmann's testimony refuted Lehman's defense that it could not have interferred with petitioner's contract or business relationship as charged in Count III because it did not have knowledge

of the American Home merger proceedings and petitioner's finder's fee arrangement before the agreement was repudiated on June 3, 1965 by American Home and Lehman. Petitioner's presentation to the Court of Appeals includes the documentary proof that in collusion with Mr. Watt, Judge Lynch, through his court staff, tampered with the reporters certification and then caused the deposition to disappear on day before the trial date. Without Mr. Canmann's testimony Lehman would have been dismissed from the case.

Although Mr. Watt had Lybrand documents 14 and 15 from the summer of 1969 he delayed until February 10, 1970 to send an interrogatory to Lybrand's New York office seeking the identity of the authors of the papers. Some five weeks afterwards Russell Woody, an associate of Mr. Watt, unwittingly revealed that Lybrand would not identify the papers and with Mr. Watt being away, this was taken up with John M. Bowlus, a partner working closely with Mr. Watt on the case. Mr. Bowlus argued it was implausible to seek identification from American Home as petitioner requested and finally around 5:30-6:00 P.M. on the last day of discoveries, March 20, 1970, Mr. Bowlus acceded by personally typing an interrogatory which he then left in the air for petitioner to make service before the deadline expired that night. After going around knocking at many doors at Mayer, Brown & Platt, petitioner managed to find a lawyler working late who was persuaded to accept service on behalf of American Home. To obscure the trap he planned for the Lybrand papers to be suppressed by Judge Lynch during the trial, Mr. Watt on April 2, 1970 sent petitioner an "I told you so" letter which was presented to the Court of Appeals as EXHIBIT "P" of appeal case 73-1418. The letter was a self serving untrue analysis of the case with two significant revelations,

(1) an express warning that on a "plausible contention," Judge Lynch will likely rule against the admissibility of the Lybrand accounting material which Mr. Watt had been holding out as the key aspect of his trial plan and (2) that no relief on appeal could be expected from this "disaster" because the Court of Appeals is biased against "little people" who sue "powerful vested interests." This revealing letter was written on the same day Mr. Watt received the copy of the Lybrand answer filed with the court (Document 146) on April 2, 1970 that it could not identify documents 14 and 15 which came from Lybrand's files. Five days later, however, the unexpected happened when American Home filed its answer (Document 148) identifying the accounting material as having been prepared by Ekco's assistant controller. The answer together with other American Home and Lybrand documents revealed that though the papers were looseleaf 8 1/2 in. x 14 in. columnar workpapers of the variety commonly used by auditors, they were Ekco's original books of entry; that the entries showing the $916,000 "finder's fee" payment to Lehman was made on the written instructions from American Home's head accountant who was a chief negotiator in the Ekco merger; that he issued the instructions on the prior approval of American Home's Chairman and Chief Executive Officer who had first hand knowledge that petitioner is the only party entitled to receive the $916,000 finder's fee recorded in American Home's books, and that as a result of Lehman's interference both American Home and Ekco planned during the merger proceedings to pay Lehman the $916,000 "finder's fee" even though all parties judicially admit for the record that petitioner is the only party legally entitled to receive any finder's fee to be paid in the merger.

Faced with the surprise that the Lybrand documents 14 and 15 are now clearly admissible under the Federal Shop Book Rule, Mr. Watt concocted a new trial plan that was 180 degrees different from what he indicated in his April 2nd letter. He announced on the eve of the trial, April 7th, that he was not going to use the Ekco books (then referred to as the Lybrand accounting material) because he intended to press the Count IV conspiracy which he alleged was structured to concede Lehman's claim that 90% of the $916,000 was for non-merger routine services and since the Ekco books contradicted this aspect of conspiracy by showing the entire $916,000 as a "finder's fee" to Lehman, he did not want to confuse the jury by using Ekco's books. (As is now known Count IV conspiracy is also structured to be empty of damages to sustain a claim against either Lehman or American Home.) Just prior to the surprise disclosure of the new trial plan, Mr. Watt hurriedly arranged a private meeting with Judge Lynch in which Judge Lynch, in urging petitioner to take the settlement being offered, reviewed the probabilities that conspiracy very likely would be dismissed during the trial and he would be forced to use his power of remititur if the jury found damages larger than justified by the evidence admitted in the trial.

With Mr. Watt on one hand excluding the Ekco books showing the only remaining $916,000 quantum meruit and interference damages not already covered up, and Judge Lynch on the other hand making veiled threats to dismiss the conspiracy which Mr. Watt was using as the excuse to exclude Ekco's books, there was, in a case in which damages was judicially admitted to be the sole issue, nothing left of proof of damages to go to the jury. On the basis of these orchestrated interacting tactics petitioner

was whipsawed and manipulated on the eve of the trial into capitulating to the settlement being offered of 14 annual payments of $35,000 each, which on a discounted basis is the equivalent to the $200,000 offered by American Home in 1965.

While the papers were being prepared petitioner contacted 30 to 35 lawyers in an unsuccessful attempt to secure new counsel. Most lawyers refused on grounds of knowing opposing lawyers or the principals. One lawyer simply said he would not attack prominent law firms. Judge John Paul Stevens, before becoming a circut judge, in declining on grounds he had at one time represented Ekco, urged petitioner to go ahead with the settlement as being an approximation of a rule of thumb to settle litigation for around 1/3 to 1/2 of the amount claimed. Later it was learned there is no such rule of thumb and that Judge Stevens has close ties with Mr. Jenner. During the appellate proceedings, Judge Stevens, in spite of having refused to represent petitioner on grounds of a conflict of interest, nevertheless, acted in a judicial capacity when ruling in a negative manner on a motion petitioner filed seeking relief with respect to its inability to secure competent counsel because of the code of silence among lawyers.

When the settlement papers were close to being completed, petitioner raised probing questions about Mr. Watt's conduct of the case and when petitioner resisted signing the papers Mr. Watt arranged a conference on February 3, 1971 ostensibly for the purpose of allowing petitioner to state its complaint. After Mr. Watt made some generalized statements of not having enough time to pursue all elements of the case and that he exercised professional judgment in picking priorities, petitioner as

soon as it started to make a presentation was interrupted by Judge Lynch with the angry statements "you're talking out of both sides of your mouth" and "you're talking to entertain yourself" after which he terminated the meeting by abruptly leaving the room. American Home and Lehman then filed a motion to dismiss the case with prejudice with a hearing set for the following Monday, February 8th. Mr. Watt filed a Petition for Adjudication of Attorney's Fees with the hearing also set for February 8th. In serving the papers, Mr. Bowlus warned petitioner that Judge Lynch was angry about the settlement papers not being completed and that he could throw the case out of court without a settlement. With the threat of forfeiture of any recovery, petitioner capitulated stating it will go ahead with the settlement. On a subsidiary level petitioner planned to use the initial proceeds of the settlement to retain the one lawyer who offered to accept the case providing he was paid a $35,000 retainer. Later it was learned this lawyer had very close business ties with both Mr. Weisl and Mr. Jenner.

Over the week-end before the Monday, February 8th hearing, petitioner prepared a memorandum setting out the basic complaint which was to become the nucleous for unraveling the cover-up conspiracy. The memorandum reviewed on pages 3 and 4 the bizarre twisting of conspiracy to exclude from the trial Ekco's books which showed the $916,000 payment to Lehman as a "finder's fee." When Judge Lynch read the memorandum he became angry and in the ensueing proceedings he made a completely unwarranted threat of jail contempt. He signed the dismissal order requested by American Home and Lehman which provided for his continuing power to enforce the execution of the settlement papers upon the request of one of

the parties. On petitioner asserting it preferred to be represented by counsel, Judge Lynch continued the hearing on Mr. Watt's lien action. At the March 16th hearing, petitioner repeated its inability to secure counsel and submitted a written motion seeking (1) access to the then missing David Canmann deposition as being important to preparing an answer to Mr. Watt's lien action and (2) that a reasonable time be granted to file an answer after the deposition was made available. Judge Lynch struck the motion as being insignificant and after ordering petitioner to be silent proceeded to rule in favor of Mr. Watt's lien. Later it was learned that in collusion with Mr. Watt, Judge Lynch, through his court staff, tampered with the deposition and caused it to disappear on the day before the trial date.

An appeal from Judge Lynch's March 16th ruling was filed June 21, 1971, Appeal Case No. 71-1447 in which petitioner sought relief for its inability to secure counsel. The Court of Appeals held there was an insufficient showing of misconduct by Mr. Watt and further held an issue of fact was not raised in the record made in the District Court. The decision was entered June 30, 1972 and appears in Appendix D.

In order to enforce his lien against the proceeds of the settlement, Mr. Watt on January 8, 1973 filed a motion before Judge Lynch requesting that petitioner be fined a $100.00 for each day it continued to refuse to complete the settlement — an action he patently had no legal right to make. The hearing included another unwarranted threat of jail contempt by Judge Lynch and another order for petitioner to stand silent while he summarily imposed a $100.00 daily fine.

Petitioner in its continuing efforts to secure competent counsel was able as a result of acquiring further insights on the legal aspects of the case, to get some definitive responses from lawyers. One lawyer who is a partner of a well known firm advised he would be jeopardizing the interests of clients with cases before the federal judges involved in the case (and by implication his own career). A distinguished law professor, after reviewing the papers, concluded that all parties to the merger by their own acts established the quantum meruit value of petitioner's finder's fee to be the $916,000 paid to Lehman and he could not understand why a reasonably prepared discovery failed to pursue this compelling showing of damages to the jury. He referred petitioner to a practicing trial attorney who is at the fore of ethics reform in government and where at first he responded favorably he was noticeably embarrassed to later advise his partners objected to his getting involved. Petitioner also happened to hear a talk given by a lawyer to a lawyer's group in which he touched on the code of silence existing in the legal profession; that the Chicago Bar Association compounded the problem by not enforcing its own rules of ethics and that its disciplinary machinery with only one 73 year old part time investigator was geared to be a wholesale "whitewashing process." The most recent lawyer response and perhaps the most cogent was the comment after reviewing the papers that he was not in the position to act the role of a "special prosecutor."

While the $100.00 daily fine was running, petitioner filed on January 29, 1973 a petition (which was supplemented by a brief field March 5th) seeking to re-open the suit against American Home and Lehman alleging that after the so-called acceptance of the still unexecuted settlement, peti-

tioner learned of the involvements of Lehman and its attorneys in the cover-up of crucial evidence and since the settlement papers provided for a general release which petitioner could not now give, there is a failure of the settlement consideration. Further that the petition to re-open came primarily under the general equitable powers of the court rather than Rule 60(b) and even under Rule 60(b) opposing parties are estopped from asseting the one year limitation because Lehman and its attorneys triggered the conspiracy of silence among lawyers thereby preventing petitioner from securing counsel who among other things would have a timely action under Rule 60(b). Judge Lynch upheld the only objection made by American Home and Lehman on grounds that Rule 60(b) one-year limitation barred the re-opening and disregarded petitioner's request that he disqualify himself because of direct conflicts of interest with a key party defendant and that an evidentiary hearing he conducted by another judge. This ruling was appealed in Case No. 73-1418 on June 20, 1973.

Appeal Case No. 73-1419

On Friday, March 2, 1973 Mr. Watt served the last of a series of papers on a motion seeking to apply Rule 70 F.R.C.P. to enforce a lien under the Illinois Attorney's Lien Statute in the amount of $20,428 against the uncompleted settlement. At the hearing held three days later on Monday, March 5th, Mr. Watt's attorney and American Home's attorney were given opportunities to argue in favor of the motion. When it came to petitioner's turn it raised a point of inquiry about the $100.00 daily fine which had been running since January 8th under Mr. Watt's motion seeking petitioner to be forced by Judge Lynch

to execute the settlement so that there would be proceeds to attach his lien. After Judge Lynch ruled he was withdrawing the fine, petitioner pointed out that Mr. Watt's current motion was served only three days before on a Friday and additional time was needed to prepare an adequate defense. Without responding to this reasonable request, Judge Lynch proceeded to summarily rule he will sign an order seizing the uncompleted settlement in the amount of Mr. Watt's $20,428 lien. A tentative brief which petitioner had hurriedly prepared over the weekend was then filed after which petitioner was asked to leave the courtroom.

On June 20, 1973, Appeal Case 73-1419 was filed in which the presentation centered around cases cited in the brief filed March 5th in the District Court which bar Mr. Watt's action. American Home has advised petitioner that the settlement is available to petitioner on the express condition it first signs and executes the settlement papers containing a waiver of all rights to claims against Lehman and its agents for their wrongful acts which petitioner alleges they committed in the cover-up acts which were not learned until after the so-called acceptance. Opposing parties do not dispute petitioner's statement on the law as cited in the District Court record and repeated in the presentation before the Court of Appeals in *Yellen* v. *Bloom*, 326 Ill. App. 134; *Standridge* v. *Chicago Rys.*, 254 Ill. 525; *Unger* v. *Checker Taxi*, 30 Ill. App. 2d 238; *Mason* v. *Papadopolous*, 12 Ill. App. 2d 140; *De Parcq* v. *Gardner*, 336 Ill. App. 144; *Cazalet* v. *Cazalet*, 332 Ill. App. 105; *Gorton* v. *Cummings*, 319 Ill. App. 525; *Coyle* v. *Motors Corp.*, 305 Ill. App. 135. These cases unanimously hold that an attorney's lien can only be enforced against "proceeds" which are actually forthcoming under a set-

tlement that is actually completed. The cases, in holding that the statute must be strictly construed, are clear that petitioner has complete control over its actions on whether to complete or not to complete the settlement. The Court of Appeals did not address these undisputed statements of long standing law cited in the District Court record. Petitioner submits that the appellate court made errors of law and fact in holding that the conditional tender to pay the uncompleted settlement are "proceeds" under the statute.

The questions raised in the District Court record and the presentation before the Court of Appeals also raise basic questions on the constitutionality of the Illinois Attorney's Lien Statute under the due process requirements of the 14th amendment and under the 5th amendment the unconstitutional application of Rule 70 to seize unrealized "proceeds" of an uncompleted settlement. The statute gives attorneys the extraordinary privilege of enforcing a lien without conforming to due process requirements imposed on all other classes of holders of liens who are not attorneys. The Attorney's Lien Statute cuts down notice time to only 5 days which is inadequate to secure counsel even if there were not a code of silence among lawyers. Additionally, under the statute the attorney's lien is enforced through an adjudication by a judge in a hearing procedure which is unaccompanied by the traditional rules and procedures of a proceedings in which the debtor has rights to trial by jury and to assert cross and counter-claims. In the decision *32 W. Randolph* v. *Blackman*, 222 Fed. Rep. 2d, the 7th Court of Appeals held that large cross and counter-claims are barred under proceedings in an attorney's lien action. The essential unfairness of depriving the debtor of its constitutional right to trial by jury is documented by the landmark report released June 1970 by the American Bar Association of a three year in-

vestigation headed by Mr. Justice Tom C. Clark. The report titled, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, documents the widespread code of silence existing in the legal profession such as petitioner determined for itself when it was finally able to pierce the wall of secrecy surrounding this insidious practice only after the lengthy process of acquiring some self-education. On page 187, the report states, in effect, that without accessibility to being represented by competent counsel, a person with a claim against a lawyer is locked out of the judicial process. On pages 168-171 the report reviews the problem as being compounded by judges "shirking" their responsibilities where except in instances of lawyers' impertinence to the court judges do not "ordinarily involve [themselves in] things that we consider breach of duty to a client". If due process requires fundamental fairness it is manifestly unfair to have judges with these widespread attitudes adjudicate professional misconduct by lawyers in an attorney's lien procedure that bars the client-debtor from a trial by jury. Redressing this patently unjust imbalance by declaring laws such as the Illinois Attorney's Lien Statute to violate due process requirements of the constitution will also provide a salutary incentive for lawyers to set their houses in order as advocated by the Chief Justice Burger's remarks in a speech on July 5, 1971 to the American Bar Association.

In this regard it is to be noted that the disciplinary reforms now going on largely due to the Justice Clark report do not go to the serious problem that nutures the code of silence continuing to be institutionalized in the legal system. The Justice Clark report on page 187 speaks of this problem in terms that lawyers will undertake malpractice suits against doctors even though it may be impossible to get medical witnesses, "at least you can get into court be-

cause you have a lawyer. But with respect to a claim against an attorney, a person can't event get to first base".

Rule 38 Sanctions

Canon 19 of the Canons of Judicial Ethics speaks of judges indicating in decisions that they have not disregarded or overlooked serious arguments in controverted cases. It is only by reason of the letter, June 3, 1974, from Mr. Watt's attorneys, Altheimer & Gray, that petitioner learned that the Court of Appeals conclusions were based on deciding the case on the District Court record. Moreover, the Court of Appeals did not indicate why it did not address two important questions which were raised in the District Court record and therefore were properly before the court. These questions are (1) that Judge Lynch should have disqualified himself on compelling grounds he is biased and has a personal interest in the case from overwhelming conflict of interest with a key party defendant and (2) that Judge Lynch acted unfairly in denying an evidentiary hearing. The question of the unfair denial of an evidentiary hearing is particularly cogent because if the evidentiary hearing was conducted it would have brought into the District Court record the cover-up evidence otherwise presented to the Court of Appeals which rebuts the Court of Appeals' decision. The failure to address these questions which were properly before the court, amounts to a denial of justice.

Petitioner further submits that the record does not justify the Court of Appeal's conclusions that petitioner is attempting to relitigate issues decided in its decision of June 30, 1972 in Appeal Case No. 71-1447. That decision expressly did not involve the underlying litigation against American Home and Lehman which petitioner is now seek-

ing to reopen under the current proceedings in Appeal No. 73-1418. The decision in 71-1447 held that Mr. Watt has a lien which he can enforce against "proceeds" of the settlement. Under long standing law there are no "proceeds" until a settlement is actually completed and "proceeds" are actually forthcoming. In order to create the statutory "proceeds" Mr. Watt filed his initial action on January 8, 1973 seeking to enforce the provision of the dismissal order dated February 8, 1971 whereby a party to the settlement can request Judge Lynch to supervise the completion of the settlement papers. Mr. Watt is not a party to the settlement and therefore had no right to file the action, nevertheless, Judge Lynch cooperated and imposed a $100.00 fine for each day petitioner refused to sign the papers. Failing to intimidate petitioner, Mr. Watt on March 5, 1973 filed the action, which is the subject of Appeal 73-1419, in which he is seeking to misuse Rule 70 to attach unrealized assets of the settlement which are not "proceeds" under the statute. Under long standing law interpreting the statute as well as the circumstances of having learned after the so-called acceptance of the uncompleted settlement of Lehman's culpability in the cover-up conspiracy, petitioner is eminently justified in refusing to complete the settlement. The law and the citations supporting petitioner's position are part of the District Court record and therefore were properly before the Court of Appeals. Petitioner's arguments also presented constitutional questions that the Illinois Attorney's Lien Statute and Mr. Watt's misuse of Rule 70 violates the due process requirements of the constitution. These are serious arguments which the Court of Appeals did not address and petitioner submits they are not frivolous as to support Rule 38 sanctions imposed against petitioner.

Mr. Watt and his attorneys, Altheimer & Gray are experts in federal civil procedure and the Altheimer & Gray letter explaining that the Court of Appeals decided the case on the record made in the District Court does not explain the Court of Appeals not addressing the serious questions which petitioner raised in the District Court record. In fact, there is a serious inconsistency in the Court of Appeals addressing Mr. Watt's letter of April 2, 1970 which is not part of the District Court record. The inconsistency is extraordinary from the standpoint that in relying in large measure on this letter for concluding petitioner was "fully informed and well advised" the Court of Appeals disregards the key aspect of the letter in which Mr. Watt, in order to shift the blame from himself for the trap he set to suppress the Ekco books during the trial, attacks the credibility and integrity of the Court of Appeals. Disciplinary Rule 8-101(B) of the Code of Professional Responsibility states "A lawyer shall not knowingly make a false accusation against a judge or other adjudicatory officer". This unheard-of countenancing of a direct unqualified attack on the integrity of the Court of Appeals made for ulterior manipulative purposes by the only party who demanded that petitioner be penalized under Rule 38 cannot but raise a question whether the court's decision was subjectively affected by (1) the complicity of the trial judge and prominent lawyers (one of whom is now a member of the Court of Appeals) in an obstruction of justice and (2) Circuit Judge Stevens' personal position in the case as described on page 22 of this petition and the bearing his judicial actions had on the court's conclusions that attorneys refused to represent petitioner because they recognized its position as being frivolous.

REASONS FOR GRANTING THE WRIT

In concluding there were no cover-up improprieties the Court of Appeals excluded compelling evidence refuting the probative value it placed on petitioner's letter of August 1962 which the court used as the basis for drawing that conclusion. According to Mr. Watt's attorneys the evidence was excluded because it was not part of the lower court record, however, it was the deliberate purpose of the cover-up plan to keep such evidence out of the record. It is, therefore, a pivotable issue in this petition that the court did not address the question timely raised in the lower court on the self-serving denial by a personally involved trial judge of an evidentiary hearing that would have brought this evidence into the record. The excluded evidence goes to proving improprieties by members of the legal system which brings the system into disrepute and it is well settled law that courts have the primary responsibilities in protecting the legal system from falling into disrepute. In not considering the transcending relevance of these improprieties, it is startling that the Court of Appeals countenanced Mr. Watt's direct attack on the Court of Appeals which as an integral part of the cover-up plan was intended to discredit the integrity of that high court as well as the integrity of federal judicial processes in general.

CONCLUSIONS

For the reasons stated and referred to above, it is respectfully requested that the Petition for a Writ of Certiorari be granted in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

SEPTEMBER TERM, 1973—JANUARY SESSION, 1974

THE CLARION CORPORATION,

Plaintiff-Appellant,

vs.

AMERICAN HOME PRODUCTS CORPORATION and LEHMAN BROTHERS,

Defendant-Appellees.

Nos. 73-1418, 73-1419
Appeal from the United States District Court for the Northern District of Illinois,
Eastern Division.
Civil No. 67 C 437
WILLIAM J. LYNCH, *Judge.*

ARGUED FEBRUARY 22, 1974—DECIDED APRIL 2, 1974

Before KILEY, *Senior Circuit Judge*, SPRECHER, *Circuit Judge*, and JAMESON, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This appeal represents a *pro se* attempt to relitigate matters which have become final either through failure to appeal in timely fashion or through a prior concluded appeal.

The Clarion Corporation brought an action against American Home Products Corporation and Lehman Brothers on March 21, 1967 for a "finder's fee" of $980,000

* Senior District Judge William J. Jameson of the District of Montana is sitting by designation.

alleged to be due as a result of its activities in bringing together the principals of American Home and Ekco Products Company, culminating in the merger of Ekco into American Home on November 5, 1965. Count I of the complaint alleged an oral agreement of March 20, 1965 for ½ of 1% (which was alleged to be $980,000) of the gross consideration paid for the acquisition of Ekco. Count II alleged that the reasonable compensation for services requested and rendered was $980,000. Count III sought $980,000 from Lehman Brothers for allegedly inducing the breach of the oral contract alleged in Count I.

American Home in its answer admitted that Clarion had performed some services in connection with bringing Ekco and American Home together and that American Home had assumed responsibility for paying whatever finder's fee might be due.

American Home pleaded as one affirmative defense that Clarion had agreed in a writing addressed to Ekco and signed by Clarion's president and sole shareholder, Paul J. Klein, on August 5, 1962, "that in the event a merger of your company is actually consummated with American Home Products Corporation, we are willing to accept $100,000.00 in settlement of our fee." The writing concluded with "we would naturally appreciate your good offices should the circumstances be amenable to further reviewing the amount of the fee." On or about October 1, 1965, American Home sent Clarion its check for $100,000, which it held but did not cash.

Extensive depositions were taken, written interrogatories were exchanged and discovery generally proceeded apace. Discovery indicated that the 1962 attempts to consummate the merger had failed and that the attempts were revided in 1964; that Clarion's claim rested upon oral

discussions between Arthur Keating, Chairman of the Board of Ekco, and Klein; that the merger was completed on November 5, 1965; that Lehman Brothers received on or about September 30, 1965 a fee of $916,064; that Arthur Keating died in 1967; and that at some time in 1965 consideration had been given by American Home to offering Clarion $200,000 for its services and if such an offer was formally or informally made to Klein, he had rejected it.

On January 30, 1970, Clarion was given leave to file an amended complaint, which repeated Counts I, II and III, but added Count IV, charging a conspiracy among officials of American Home, Ekco and Lehman Brothers to pay a $916,064 fee to Lehman and to refuse to pay Clarion the reasonable value of its services. The basis for the adding of Count IV was the fact that discrepancies had apparently been discovered as to whether the Lehman fee was payment for its services in the American Home-Ekco merger or was in fact payment in whole or substantial part for other unrelated services performed for Ekco. A discovery dispute also centered around Lehman's contention that finders' fees were customarily 10 to 15% of investment bankers' fees (which presumably would make a finder's fee of $100,000 reasonable). In view of the written agreement of 1962 establishing Clarion's fee at $100,000 and Lehman's contention that $100,000 was reasonable, the probability of Clarion's succeeding under Counts I and II was highly speculative and undoubtedly motivated the adding of Count IV.

The case was set for trial on April 8, 1970. Literally on the eve of trial (the day and night of April 7) the parties agreed to a settlement of fourteen annual payments of $35,000 each, or a total amount of $490,000. Consequently, the case was dismissed on April 8 without prejudice

and with the leave of court to reinstate if necessary, pending the completion of complicated settlement documents. On that date, the trial judge placed on the record the fact that by accident he had run into Klein the night before while the judge was taking his evening walk and that Klein had reported the details of the settlement at that time to the judge.

The settlement documents required some ten months to prepare. When they were ready, however, Klein refused to execute them on behalf of Clarion because of a dispute he was having with Clarion's lawyers in regard to attorneys' fees. Upon American Home's motion, the court on February 8, 1971 reinstated the case and dismissed it with prejudice, retaining jurisdiction for the sole purpose of supervising (if requested) the exchange of settlement documents. On February 8, Klein advised the court that "I am prepared to . . . execute the documents" and "I am prepared to close the documents." He also filed a memorandum with the court which set forth the attorney fee dispute and concluded with "I stand ready . . . to go ahead with Mr. Burnham in closing the settlement agreement." The February 8, 1971 judgment order was not appealed.

On March 16, 1971, the court ordered that the parties exchange executed settlement documents and that defendants deliver the first annual payment of $35,000, the proceeds of which were to be divided $17,707.44 to Clarion's attorneys for fees and the balance to Clarion. At this point, Klein proceeded to act without counsel on behalf of Clarion and appealed the order.

We affirmed the district court in *Clarion Corp. v. American Home Products Corp.*, 464 F.2d 444 (7th Cir. 1972) stating:

"Plaintiff's president has not presented to this court or the District Court any valid reason why the lien imposed upon the first installment of the settlement proceeds should not be enforced. Indeed, the only defense offered by plaintiff in regard to the claim for attorneys' fees is that the case for Clarion against American and Lehman was not handled properly; and yet, as indicated earlier, when the settlement was offered, plaintiff accepted the terms and conditions thereof without objection. Thus, this court has no choice but to affirm the decision of the lower court. Moreover, even if we were free to go back into the original case and scrutinize the conduct of plaintiff's attorneys, we would reach the identical conclusion. However, since plaintiff accepted the settlement without objection or appeal, and because he has appealed only the lower court's decision as to the enforcement of the lien, we must affirm the District Court."

Following remand to the district court, the former Clarion attorneys sought relief pursuant to Rule 70 FED. R. CIV. P.[1] and shortly thereafter Klein, still acting without

[1] Rule 70 provides: "If a judgement directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk."

counsel on behalf of Clarion, moved to vacate the February 8, 1971 judgment order to "redress serious inequities." Klein's motion was denied on March 1, 1973. This order was appealed under our No. 73-1418.

On March 5, 1973, the court ordered that (1) Clarion Corporation be divested of all right, title and interest in and to $20,486.21 (the original amount of $17,707.44 plus interest and costs) and that (2) defendants deduct and pay that amount to the attorneys and receive a credit for it against the initial installment of $35,000 owed to Clarion under the settlement. This order was appealed under our No. 73-1419. We were advised at oral argument that checks for the $35,000 installments are delivered to Clarion each year but are not cashed.

Although it is extremely difficult to determine on what legal basis Klein seeks to continue to litigate the judgment order and the attorney's lien, apparently the grounds are:[2] (1) In No. 1418, the client's consent to the settlement was given without complete knowledge of the facts; and (2) In No. 1419, the attorneys' lien is conditioned upon the settlement and if one falls so must the other.

Compromises of disputed claims are favored by the courts. *Williams* v. *First National Bank,* 216 U.S. 582, 595 (1910). Abraham Lincoln is often quoted in his advice to lawyers:

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, ex-

[2] As with most lay persons, Klein explores in infinite detail a host of irrelevant matters but sheds no substantial light on what seems to be the crux of his current opposition to the settlement.

> penses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man."[3]

Former Canon 8 of the Canons of Professional Ethics provided that "[w]henever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation." The present Code provides this ethical consideration (EC 7-5):[4]

> "A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his clients of the practical affect of such decision."

On April 2, 1970, as the April 8 trial date neared, Clarion's attorneys furnished Clarion and Klein with an eight-page single-spaced letter reviewing in detail the strength and weakness of Clarion's cause of action: the difficulties of proving an oral contract when the opposing discussant is dead; the battle of experts as to what would be a reasonable fee; the written agreement for $100,000 and the $100,000 tendered check; the jury's possible feeling that "$100,000 is a lot of money"; the credibility factor where Klein's testimony is contradicted by high executives of American Home and Lehman Brothers; the unexpected and unknown factors which may influence a jury; the

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[3] American Bar Association, Code of Professional Responsibility and Canons of Judicial Ethics 48 (1969). *Cf. Estin* v. *Estin*, 334 U.S. 541, 545 (1948): "(T)here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests."

[4] American Bar Association, Code of Professional Responsibility and Canons of Judicial Ethics 25 (1969).

complications of trial and the difficulties of introducing some of the evidence; the expenses of discovery and trial preparation, and the additional cost of a lengthy trial and possible appeal; the time required to collect any judgment after trial and appeal; the chances of reversal on appeal and the possibility of retrial; and many others. The attorneys concluded that a settlement in the range of $450,000-$490,000 "would represent an excellent settlement in light of the probabilities of what will happen at trial"; that "the chances are 50-50 that the verdict will be as much as $450,000; in fact my own view is that the chances of a verdict as large as that are about one in five"; and that "you must decide" what to do.

Significantly, the attorneys' letter also pointed out:

> "The sole objective of the litigation is to get money for you; it is not to visit some kind of revenge on the defendants, nor is it to make an example of them so that, for fear of further repercussions, they will mend their ways.
>
> ". . . [I]t is a major mistake to let extraneous factors—such as 'proving' something to someone—get in the way of a hard-headed, dollars and cents, monetary evaluation of the case."

The Code of Professional Conduct includes these further ethical considerations (EC 7-8):[5]

> "In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions."

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[5] *Id*, at 25.

Once the lawyer has fulfilled his obligation to evaluate the situation, the final decision whether to settle or not is for the client alone.

In this case the client (Klein acting as and for Clarion) personally advised the trial judge on the night of April 7, 1970, that the case had been settled for $490,000; ten months later on February 8, 1971, he appeared in open court and at least twice acknowledged that he and Clarion had approved the settlement; and at that time he also filed a writen memorandum stating that but for his dispute about the amount of the legal fees he stood ready to close the settlement. As late as with the filing of his brief in this court on June 20, 1973, Klein stated that he "felt there was no other practical alternative but to accept and to use the initial $35,000 settlement proceeds to employ new counsel to investigate what was legally at fault with the handling of the case." In other words, he believed that he could use the settlement proceeds for the purpose of overturning the settlement.

As this court said in *Cummins Diesel Michigan, Inc.* v. *The Falcon,* 305 F.2d 721, 723 (7th Cir. 1962):

> "Federal and State Courts have held under a great variety of circumstances that a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the Court [citing cases]."

The only possible ground on which Klein could upset the voluntarily entered settlement would be that it was procured through fraud. One who relies upon fraud, misrepresentation, or concealment must sufficiently allege and prove it. *Clark* v. *Barlow,* 122 F.2d 337, 341 (D.C. Cir. 1941). The allegations and proof must be clear and convincing and must show (1) a representation, (2) its

falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth and (8) his right to rely thereon. *McCarthy* v. *Cahill*, 249 F.Supp. 194, 196 (D.D.C. 1966).

Klein has filed a great volume of documents in the district court and here. He has had ample time to ponder what his fancied grievances may be. Aside from generally allegeing a conspiracy among the trial judge, all of Clarion's and his former attorneys, and most of the local bar (for failing to represent him in one case where the time to appeal has long since passed and another case where appeal was taken and lost), he has developed nothing to allege any of the elements to show that the settlement was procured by fraud.[6]

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[6] Moreover, under Rule 60(b) FED. R. CIV. *P.*, a motion to vacate a judgment for fraud must be filed within one year.

We have already in our previous opinion dealt with Klein's unpersuasive complaint that Clarion's case had somehow not been properly handled, 464 F.2d 444, 445-46. Nevertheless, we have carefully read through all of Klein's writings to attempt to fathom his grievances and we have also gone through the entire record in this case to try to determine whether anything he has said has any basis in fact or whether something appears in the record which he has not alluded to but which bears the slightest trace of unfairness to or overreaching of Clarion or Klein. We find nothing of that nature.

The case was diligently and competently handled by all of Clarion's and Klein's former counsel. In view of the voluntary settlement, the trial judge had no oppor-

tunity to display any prejudice against Clarion or Klein. The settlement is unquestionably an excellent and remunerative one. His former attorneys advised him that the purpose of litigation is not "revenge" or to "make an example" of defendants.

What finally emerges from documents Klein has filed is the complaint that the strategy of the case was mishandled. If this were so, it would not have any legal effect at this point. But it is manifestly not so. We have read the discovery in the form of the depositions and interrogatories and answers. The strategy was sound and at times exceedingly adept. Klein objects. for example, to the strategy of adding Count IV, but it was probably this count which persuaded the favorable settlement. Klein objects at one time that the cost of discovery was "prohibitively expensive" and then devotes the remainder of his brief to complaints about the failure to "follow through" on further discovery of insignificant details. We found that Klein was personally present at virtually every deposition. He was, far more than the average client, aware of every fact discovered and of every strategy pursued. When he approved of and consented to the settlement, he was fully informed and well-advised.

Klein's course of action since the dismissal of the case on February 8, 1971 (as to No. 73-1418) and since our opinion in 464 F.2d 444 (as to No. 73-1419) has been frivolous and obstructive and has caused a shameful waste of judicial manpower.

Rule 38 F.R.A.P. provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award

just damages and single or double costs to the appellee.'"[7] Rule 38 was designed to penalize litigants for just such tactics as these and to compensate those who have been put to the expense of answering such wholly frivolous appeals. *Oscar Gruss & Son* v. *Lumbermen's Mutual Casualty Co.*, 422 F.2d 1278, 1283-84 (2nd Cir. 1970); *N.L.R.B.* v. *Smith & Wesson*, 424 F.2d 1072 (1st Cir. 1970); *Fluoro Electric Corp.* v. *Branford Associates*, 489 F.2d 320, 326 (2nd Cir. 1973).

In assessing a penalty we have taken into account the fact that Klein is a layman but that nevertheless he should have understood that the refusal of many attorneys to represent him was not a conspiracy but instead a recognition of the frivolity of his position.

The judgments in 73-1418 and 73-1419 are affirmed. Pursuant to Rule 38, each appellee is awarded damages against Clarion Corporation in the sum of $2,500 and double costs.

AFFIRMED.

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[7] 28 U.S.C. §1912 also provides: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

APPENDIX B

For the Seventh Circuit
Chicago, Illinois 60604
May 17, 1974.

Before

Hon. ROGER J. KILEY, *Senior Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. JAMESON, *Senior District Judge*

THE CLARION CORPORATION,

Plaintiff-Appellant,

Nos. 73-1418, 73-1419 *vs.*

AMERICAN HOME PRODUCTS CORPORATION and LEHMAN BROTHERS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois,
Eastern Division.
Civil No. 67 C 437
WILLIAM J. LYNCH, *Judge.*

ORDER

The court having considered the plaintiff's petition for rehearing, the letter of Mayer, Brown and Platt dated April 9, 1974, and the letter of Altheimer and Gray dated April 11, 1974, it is ordered that:

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* Senior District Judge William J. Jameson of the District of Montana is sitting by designation.

1. The last sentence of the first full paragraph on page 5 of the slip opinion is amended to read as follows:

> We were advised at oral argument that checks for the $35,000 installments have been tendered to Clarion each year.

2. The clause between semi-colons on lines one and two of page 7 of the slip opinion is amended to read as follows:

> that "we do not think the chances are 50-50 that the verdict will be as much as $450,000";

3. The petition for rehearing is denied.

4. No judge in regular active service having requested a vote on the suggestion for rehearing *en banc,* said petition for rehearing *en banc* is also denied.

APPENDIX C

ILLINOIS REVISED STATUTES

13 § 14 ATTORNEYS AND COUNSELORS

§ 14. Attorney's lien for fees—Enforcement

Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action. To enforce such lien, such attorneys shall serve notice in writing, which service many be made by registered or certified mail, upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action, and such lien shall attach to any verdict, judgment or decree entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than 5 days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in term time or vacation. 1909, June 16, Laws 1909, p. 97, § 1; 1927, June 30, Laws 1927, p. 186, § 1; 1957, July 6, Laws 1957, p. 1291, § 1.

Historical Note

The amendatory act of 1927, provided for service of notice by registered mail.

The 1957 amendment authorized service of notice by certified mail.

Title of Act:

An Act creating attorney's lien and for enforcement of same. Filed June 16, 1909. In force July 1, Laws 1909, p. 97.

APPENDIX D

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 71-1447

THE CLARION CORPORATION,

Plaintiff-Appellant,

vs.

AMERICAN HOME PRODUCTS CORPORATION and LEHMAN BROTHERS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 67-C-437
WILLIAM J. LYNCH, *Judge.*

ARGUED APRIL 24, 1972—DECIDED JUNE 30, 1972

Before SWYGERT, *Chief Judge,* PELL, *Circuit Judge,* and LARAMORE,* *Senior Judge.*

PER CURIAM. This is an appeal by the Clarion Corporation from a decision of the United States District Court for the Northern District of Illinois, Eastern Division, Honorable

* Senior Judge Don N. Laramore of the United States Court of Claims is sitting by designation.

William J. Lynch, Judge, presiding. Said decision, rendered by Order dated March 16, 1971, adjudged plaintiff, the Clarion Corporation, liable for attorneys' fees in the amount of $17,707.44. In addition to the appeal from the March 16 Order plaintiff appeals from the Order of the District Court, entered April 8, 1971, denying plaintiff's motion for reconsideration of the Order of March 16, 1971. As for both appeals it is our decision to affirm the District Court.

The facts of this dispute indicate that the true conflict hereinafter resolved exists not between Clarion and American Home Products plus Lehman Brothers, as the title of the case indicates, but instead between the Clarion Corporation and the attorneys for Clarion. Those attorneys, members of the Chicago law firm of Cotton, Watt, Jones, King & Bowlus, represented the Clarion Corporation in the action originally filed as the name appears in the case heading. That original case, a breach of contract suit, was started in the Federal District Court because of the diversity of citizenship between Clarion and the named defendants. Therefore, since the case was originally instituted as *The Clarion Corporation* v. *American Home Products and Lehman Brothers* it continues to bear the same name even though the case, as it now stands, is one for collection of attorneys' fees and wholly unrelated to the case as originally filed.

The phase of the case herein decided is based upon a *state* statute which provides for an attorney's lien upon the claims which may be placed in the hands of an attorney. See, Illinois Revised Statutes, 1969, chapter 13, section 14. There is no question, however, that a Federal District Court may adjudicate the attorney's fee question pursuant to the lien created by said statute (*see, Peresipka*

v. *Elgin, J & E Rwy. Co.*, 231 F.2d 268 (7th Cir. 1956)); the theory being that if the original action has a proper basis for Federal jurisdiction then any recovery achieved by that suit creates an attachable interest upon which the attorney may assert his claim for fees. In this case such an interest was created when the original defendants offered, and the plaintiff accepted, a settlement of all pending claims for the sum of $490,000 payable in annual installments of $35,000 for 14 years.

Following the acceptance by plaintiff of the settlement offer, additional difficulties arose. In essence, those difficulties were that plaintiff's president felt that the attorneys, appellees in this case, had not properly handled the conduct of Clarion's case against American Home Products and Lehman Brothers. He felt this way notwithstanding his total acceptance of the settlement offer in the original case and it was only subsequent to the oral agreement for settlement that plaintiff's president objected to the attorneys' method of handling the case. Consequently, objections now raised by plaintiff's president (who has acted in this phase of the case without counsel) which are directed mainly to the proceedings prior to settlement, have no relevance to the appeal from the District Court's orders pertaining to attorneys' fees. Plaintiff's president has not presented to this court or the District Court any valid reason why the lien imposed upon the first installment of the settlement proceeds should not be enforced. Indeed, the only defense offered by plaintiff in regard to the claim for attorneys' fees is that the case for Clarion against American and Lehman was not handled properly; and yet, as indicated earlier, when the settlement was offered, plaintiff accepted the

terms and conditions thereof without objection.[1] Thus, this court has no choice but to affirm the decision of the lower court. Moreover, even if we were free to go back into the original case and scrutinize the conduct of plaintiff's attorneys, we would reach the identical conclusion. However, since plaintiff accepted the settlement without objection or appeal, and because he has appealed only the lower court's decision as to the enforcement of the lien, we must affirm the District Court.

Pursuant to state statute, the appellees' attorneys filed their verified petition for an adjudication of their rights in connection with the attorneys' lien. The petition was before the District Court on two separate occasions, at which the plaintiff's president was present. On neither occasion were the allegations of the petition controverted or denied. There was no denial of the retainer agreement referred to in the petition nor was it controverted that the attorneys performed the services alleged therein. Although the plaintiff's president at the last of the two hearings did deny that the plaintiff owed the claim, none of the specific facts alleged in the claim was controverted. Since there were no issues of fact which could have been the subject of any hearing, the District Court properly ruled that the attorneys' lien should be enforced in the amount requested, which amount the court found to be reasonable for the services rendered.

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[1] The plaintiff's original case was settled by way of the District Court's Order of February 8, 1971, whereby the action was reinstated and dismissed with prejudice. Such action was taken pursuant to the Motion of American Home Products and Lehman Brothers and was unobjected to by plaintiff or its president. Moreover, there is no appeal from that Order.

For the foregoing reasons, we affirm the judgment of the District Court.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.